81-1022

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October Term, 1981

No. 81-

IN THE

Supreme Court of the United States

PRESS-ENTERPRISE COMPANY,
AND COPLEY PRESS, INC.,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF SAN DIEGO

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

GEORGE WAYNE SMITH,
CHRISTOPHER GREGORY HARVEN,
RUSSELL AARON HARVEN,

Defendants.

**Petition for a Writ of Certiorari to the
Court of Appeal of the State of California
Fourth Appellate District, Division I**

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The PRESS-ENTERPRISE COMPANY and COPLEY PRESS, INC., respectfully petition that a Writ for Certiorari issue to review the Order of the Court of Appeal of the State of California, Fourth Appellate District, Division I, entered in this proceeding on June 30, 1981.

QUESTIONS PRESENTED

1. Is the exclusion of the public from the voir dire proceedings in capital cases in direct violation of the public's rights guaranteed under the United States Constitution First Amendment as interpreted by this Court in *Richmond Newspapers Inc., vs. Virginia*, 448 U.S. 555; 65 L.Ed.2d 973; 100 S.Ct. 2814 (1980)?

2. Has the application of the California Supreme Court decision of *Hovey vs. Superior Court*, 28 Cal.3d 1; 168 Cal. Rptr. 128; 616 P.2d 1301 (1980) deprived the public of the right to attend criminal trials as guaranteed by the First Amendment of the United States Constitution extended through the Fourteenth Amendment to the citizens of every state?

3. Has the application of the California Supreme Court decision of *Hovey vs. Superior Court*, 28 Cal.3d 1; 168 Cal. Rptr. 128; 616 P.2d 1301 (1980) and its application by the lower courts deprived the public of the right to attend criminal trials as guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution?[1]

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1. The parties to this action are: PRESS-ENTERPRISE COMPANY, COPLEY PRESS, INC., SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO.

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ORDERS BELOW

The Order of the Court of Appeal of the State of California was not reported, and appears in the Appendix hereto (see appendix, page sixteen). The Order of the Supreme Court of the State of California denying hearing is not reported.

JURISDICTION

The Order of the Court of Appeal of the State of California, Fourth Appellate District, Division I, was entered on June 30, 1981. An extension to November 30, 1981, to petition for Writ of Certiorari was granted by the Honorable Justice William H. Rehnquist, The Order of the Supreme Court of the State of California denying petitioners' petition for hearing was entered on July 29, 1981. Under 28 U.S.C. Section 1257(3) this Court's jurisdiction is invoked.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment 14, Section 1:

> ". . . nor shall any state deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction to equal protection of the laws."

STATEMENT OF THE CASE

The only issue faced by the California courts was the public's right, as represented by the petitioners herein, to attend criminal trials, specifically, the voir dire process concerning the selection of potential jury persons in the capital case of the *People of the State of California vs. Smith, et al.*

The record before the lower court was through a verified petition of counsel containing the following pertinent facts:

1. Petitioner, PRESS-ENTERPRISE COMPANY, a California corporation, publishes two newspapers of general circulation, THE MORNING PRESS-ENTERPRISE and THE EVENING PRESS-ENTERPRISE, from its principal offices located in Riverside, California.

2. Petitioner, COPLEY PRESS, INC., publishes among others a newspaper of general circulation in the San Diego County area, The SAN DIEGO UNION from its principal offices located in San Diego, California.

3. There is a criminal action currently before respondent court, entitled *People of the State of California vs. George Wayne Smith, Christopher Gregory Harven, and Russell Aaron Harven*, San Diego Superior Court Number CRN 6940, formerly of Riverside Superior Court Number CR 17751, said action having been transferred to San Diego on a motion for change of venue. That action involves a complaint filed by the Riverside County District Attorney's Office seeking the imposition of the death penalty against named defendants arising out of the shooting death of a deputy sheriff after a bank robbery in Norco, California.

4. Petitioners herein made formal and oral motions before the trial judge after the court had stated its intention to exclude the public from the voir dire proceedings. A hearing was held in the trial court on the motion to allow the presence of the public during the voir dire proceedings. The trial court concluded that if the voir dire proceedings were "published in public", this would materially affect the rights of the defendants to a fair trial by impartial jurors, and accordingly, ordered that the examination of jurors be sequestered from the public and fellow jury persons.

Both petitioners immediately sought review by the Court of Appeal, State of California, Fourth Appellate District, Division I. That Court, through the Honorable Presiding Justice Gerald Brown, modified the lower court's order in an unpublished order filed on June 30, 1981. It approved the lower court's exclusion of the public from the voir dire proceedings as long as a transcript was released to the public at the time the so-called "public part" of the trial began, with the calling of the first witness.

The petitioners sought a hearing before the California Supreme Court, which was summarily denied on July 29, 1981, and this Petition for Certiorari followed.

REASONS FOR GRANTING THE WRIT

I

The Public has a Constitutional Right to Attend Criminal Trials

The First Amendment of the United States Constitution provides for the right of free speech and rights of free press.

This Court in *Richmond Newspapers, Inc. vs. Virginia*, 448 U.S. 555; 65 L.Ed.2d 973; 100 S.Ct. 2814 (1980), interpreted this important right as it related to criminal trials:

> "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials,

> which people have exercised for centuries, the important aspects of freedom of speech and 'the press could be eviscerated'." *Richmond Newspapers, Inc. vs. Virginia*, 448 U.S. at 580; 65 L.Ed.2d 991-92; 100 S.Ct. at 2829.

The above coupled with another of this Court's decision, *Gannett Company, Inc. vs. DePasquale*, 443 U.S. 368; 99 S.Ct. 2898; 61 L.Ed.2d 608 (1979) have established that there is an independent public interest in the Sixth Amendment guarantee of a public trial, as protected implicitly by the First Amendment.

Therefore, it is clear that the public has a right to attend criminal trials.

II

The Voir Dire Proceedings is an Integral Portion of the Trial Process

The voir dire examination of prospective jurors has been considered a public and integral part of the complete trial process (as cited in the opinion of Justice Blackman in *Gannett Company, Inc. vs. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898; 61 L.Ed.2d 608; 432 N. 12 (1979) the Arkansas case of *Commercial Printing Company vs. Lee*, 262 Ark. 87 553 S.W. 2d 270; (1977).

During the voir dire examination the trier of fact is selected. A trial obviously cannot be called a "public" trial when this important function is done in private. The judicial process would be subject to suspicion and doubts cast on its ability to function as the disciplinary arm of society if the trier of fact is chosen in secret.

This Court quoted J. Bentham, Rational of Judicial Evidence 524 (1827) in its recent *Richmond Newspapers* case for the need for publicity in trials:

> "Without publicity, all other checks are insufficient: in comparison of publicity, all of other checks are of small count. Recordation, appeal,

> whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." 448 U.S. at 569; 100 S.Ct. 2824; 65 L.Ed.2d at 985.

Therefore, the lower court's decision that a transcript of the voir dire proceedings would protect the public's right to attend the trial is erroneous. A transcript of the proceeding provides us with lifeless words and cannot be a substitute for observation of the demeanor, appearance, facial expressions and speech inflections of a person while testifying, be it as a witness or as a prospective juror. Unjustifiable discretion would be left to the court reporter, since even punctuation could be of great significance in a transcript.

III

The California Supreme Court's Decision in Hovey and it's Application by the Lower Courts Have Deprived the Public of its Right to Attend Criminal Cases Involving Capital Offenses

The California Supreme Court decision in *Hovey vs. Superior Court*, 28 Cal.3d 1; 168 Cal.Rptr. 128; 616 P.2d 1301 (1980) and the application by the lower courts in the instant action has deprived the public of its common law and constitutional rights to attend criminal trials involving capital offenses.

Chief Justice Rose Bird of the California Supreme Court in *Hovey* ruled as follows:

> "In order to minimize potentially prejudicial effects identified by the Haney study, this court declares, pursuant to its supervisory authority over California criminal procedure, that in future capital cases that portion of the voir dire of each prospective jury which deals with issues which involve death-qualifying the jury should be done individually and in sequestration."
>
> *Hovey vs. Superior Court*, 28 Cal.3d 80; 616 P.2d at 1354; 168 Cal.Rptr. at 181.

It should be noted that the basis for the *Hovey* decision is not a study involving the potential influences or bias of the public on prospective jurors. The Haney study involved a single study which polled only 67 persons who viewed a simulated video taped voir dire proceeding. The conclusion was reached that prospective jurors were influenced by the amount of time spent on death-qualifying voir dire proceedings, as well as the obvious effect of fellow prospective jurors being disqualified because they could not believe in the death penalty as an appropriate punishment. There is no mention in the Haney study of any influence of the public might have during voir dire proceedings.

The decision in *Hovey* court also provides as follows:

> "This rule will not in any way affect the open nature of the trial. Although trial counsel and the court may pose general questions to the panel, venire persons shall not respond to any questions beyond those routinely asked in any criminal trial until they are *outside the presence of their fellow venire persons*". (Emphasis added)
>
> *Hovey vs. Superior Court*, 28 Cal.3d 80-81; 616 P.2d at 1354; 168 Cal.Rptr. at 181

While it is clear that the rights of the accused must be protected in capital cases, the protections afforded, especially to the exclusion of the rights of others, must have a firm and reasonable basis. The complete opinion of *Hovey* lacks that basis for the exclusion of the public during the voir dire proceedings.

IV

The Public's Right Under the Fourteenth Amendment, Due Process Clause, Has Been Violated by the California Supreme Court's Edict in Hovey vs. Superior Court

As previously cited, the California Supreme Court pursuant to "its supervisory authority over California criminal

procedure," mandated that the voir dire proceedings on death-qualifying issues would be done individually and in sequestration. *Hovey vs. Superior Court*, 28 Cal.3d 80; 168 Cal.Rptr. 128; 616 P.2d 1301 (1980).

This Court's recent decision in *Richmond Newspapers, Inc. vs. Virginia*, 448 U.S. 555; 65 L.Ed.2d 973; 100 S.Ct. 2814; (1980) established the public's implicit right within the First Amendment to attend trials.

In *Near vs. The State of Minnesota*, 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931) this Court reaffirmed that the liberties granted under the First Amendment were protected under the Fourteenth Amendment as follows:

> "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."
>
> *Near vs. The State of Minnesota*, 283 U.S. at 707; 75 L.Ed. at 1363; 51 S.Ct. at 628

It has also been held that the judicial branch of the state is also subject to the same limitations of the due process clause of the Fourteenth Amendment as the Executive and Legislative Branches of the states, *Bouie vs. City of Columbia*, 378 U.S. 347, 353-354; 12 L.Ed.2d 894, 84 S.Ct. 1697.

A. The California Supreme Court Has Not Stated a Sufficient Basis for Violating Petitioner's First Amendment Rights

The California Supreme Court and the lower courts have not overcome the heavy burden that a prior restraint of Petitioner's First Amendment rights is unconstitutional.

In the instant case, the mandate contained in the *Hovey* decision amounts to a prior restraint on the exercise of Petitioner's First Amendment Rights, as interpreted in the *Richmond Newspapers* case. It cannot logically be argued that there is no prior restraint. On its face while not restricting exercise of the First Amendment right, the right has been denied because the public has been deprived of access to the source, the voir dire proceedings in capital cases.

This Court in *Nebraska Press Association, et al., vs. Hugh Stewart*, 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791 reaffirmed the long standing principle of liberty that the Fourteenth Amendment safeguards the rights and guarantees of the First Amendment:

> "The First Amendment provides that 'Congress shall make no law . . . abridging the freedom . . . of the press,' and it is 'no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.' *Near vs. Minnesota exrel, Olson*, 283 U.S. 697, 707, 75 L.Ed. 1357, 51 S.Ct. 625 (1931). . . . The court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary — orders that impose a 'previous' or 'prior' restraint on speech. None of our decided cases on prior restraint involve restrictive orders entered to protect a defendant's right to a fair and impartial jury, but the opinions on prior restraint have a common thread relevant to this case."
>
> *Nebraska Press Association vs. Hugh Stewart*, 427 U.S. at 556; 49 L.Ed.2d at 695-696; 96 S.Ct. at 2801

This Court declared that a common thread in all of the cases dealing with these rights was the dissatisfaction with prior restraints:

> "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct and otherwise, does the law's sanction become fully operative.

> "A prior restraint, by contrast and by definition has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for a time."
>
> *Nebraska Press Association vs. Hugh Stewart*, 427 U.S. at 559; 49 L.Ed.2d at 697-698; 96 S.Ct. at 2803

A complete examination of the *Hovey* decision reveals that there is no discussion of possible alternatives concerning the public's right to attend a trial. Less stringent alternatives such as the ones mentioned in the *Nebraska Press Association* case were not considered.[2]

The *Hovey* decision through its application and expansion by the lower courts has established a prior restraint to access and reporting of the voir dire proceedings in capital cases. With the establishment of such a restraint, the California Supreme Court and the lower courts have failed to rebutt the presumption that such a prior restraint is unconstitutional.

B. The Mandate in Hovey Has Violated Other Constitutional Provisions Included in the Due Process Clause of the Fourteenth Amendment

The decision of *Hovey* and its application by the lower courts, excluding the public from the voir dire proceedings on the death-qualifying issues of a jury is based upon an overly broad and vague mandate of the California Supreme Court.

Before pointing out the standards which statutes must meet in order to be constitutional, certain observations on the *Hovey* decision and its application must be made. The California Supreme Court stated that its restriction on the voir dire

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2. Alternatives suggested in *Nebraska Press Association*, 247 U.S. 539, were: (1) change of venue; (2) postponement of the trial to allow public attention to subside; (3) questioning prospective jurors to screen those with fixed opinions as to guilt or innocence; (4) the use of emphatic and clear instructions on the sworn duty of each juror to decide only on evidence presented in open court; (5) sequestration of jurors, *Nebraska Press Association vs. Hugh Stewart*, 427 U.S. at 563, 564, 49 L.Ed2d at 700; 96 S.Ct at 2805.

proceedings would in no way "affect the open nature of the trial". The application of the *Hovey* decision has inevitably affected the open nature of the trial by excluding public attendance at the most crucial point in the trial, that being the qualifying of the jury to sit on a capital case. There is no mention in the *Hovey* decision of the influence the public may or may not have on the venire persons during this part of the voir dire proceedings. The application by the lower courts in excluding the public from the voir dire proceedings has no basis or foundation in the *Hovey* decision.

It is a well settled principle of law that statutes must be narrowly drawn to afford the citizens a sufficiently definite warning as to the proscribed conduct when measured by the common understanding of men of common intelligence, *Jordon vs. DeGeorge*, 341 U.S. 223; 95 L.Ed. 886; 71 S.Ct. at 703 (1951).

The mandate of the California Supreme Court in *Hovey* closing the voir dire proceedings on death-qualifying issues is subject to the same scrutiny as legislative enactments.

Therefore, what is the "proscribed" conduct, in the *Hovey* decision as it relates to the public's right to attend the trial? The California Supreme Court states that its decision will not affect the open nature of the trial, while the application of the decision by the lower courts has clearly denied the public access to all or certain portions of the voir dire proceedings.[3]

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3. Perhaps the fault lies in the absence from the *Hovey* decision of a definition of the word "sequester". Riverside County, California, the county originating the instant case, a small jurisdiction has had three other judges face the jury selection question in capital cases since the commencement of jury selection in the instant case. Each of the three judges chose a different method of handling the jury selection. Two chose to "sequester" the jury only during death-qualifying questioning but left the process open for the "general" voir dire. Each judge used a different approach in handling the matter, however. In a third case the judge "sequestered" the venire persons one from another but kept the process open to the public.

In the instant case jury selection commenced on July 7, 1981, and at this writing continues. A jury of 12 persons was selected and sworn on October 26, 1981, after 57 days of questioning over a 111 day period of time, but at this November writing all alternates have still not been selected.

It is respectfully submitted to this Court that a mandate from any judicial body should be reviewed on an even higher standard than that regularly applied to legislatively enacted statutes. This is especially true when constitutional rights are at issue. A rule of law created by the judicial branch is without the input that citizens ordinarily have through their legislative process. Access to the judicial branch is usually limited to the parties to that action.

The principle submitted to this court is simple, in that based upon the study examined by the California Supreme Court in *Hovey*, that Court has mandated their voir dire proceedings on death-qualifying issues for potential jurors should be done individually. The question not answered by the *Hovey* decision is what effect does the decision have on the public's right to attend these trials. The decision in *Hovey* is not clear. When a decision of the judicial branch is unclear, and has failed to state specifically what type of conduct is prohibited, then such a mandate is overly broad.

CONCLUSIONS

It is impossible to accept the argument that the public should be excluded because its "presence" might possibly influence the responses of prospective jurors in voir dire proceedings; certainly not on the basis of a single test involving 67 selected persons. Will the next challenge to the public's right to attend a trial be on the ground that witnesses might be intimidated by the "presence" of the public at trial? Will it even be argued that the responses of the accused, should he testify, will be influenced by the mere presence of the public at trial?

More important, what are the consequences of the chipping away of the public's right to attend trials? The gravest consequence is the loss of confidence in the system that is designed to serve the public.

It is because such questions remain unanswered, and because of the confusion in the wake of the *Hovey* decision and on the legal basis already stated, that the Petitioners respectfully request that this Court grant a Writ of Certiorari, reverse the decision below and grant a hearing to consider the rights of the public to attend and observe the trial process.

THOMPSON & COLEGATE

By: _____
JAMES D. WARD

GRAY, CARY, AMES & FRYE

By: _____
EDWARD J. McINTYRE

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

COURT OF APPEAL - FOURTH DIST.
FILED
JUN 30 1921
ROBERT L. FORD, Clerk
DEPUTY CLERK

DIVISION ONE

THE SAN DIEGO UNION
v.
SUPERIOR COURT ETC.,
COUNTY OF SAN DIEGO

4 Civil No. 24896

PRESS-ENTERPRISE CO.,
vs.
SUPERIOR COURT ETC.,
COUNTY OF SAN DIEGO.

4 Civil No. 24897

SUPERIOR COURT NO. CRN 6940

THE COURT:

The petitions for writ of mandate have been read and considered along with lodged opposition. Provided the trial court permits transcription of the closed portions of the voir dire examination, to be released to the press and public when the public part of the trial begins, and further provided the trial is open to the public from the time the first witness is sworn, the trial court is acting within its discretion here. The petitions are denied without prejudice to applications for further relief should these conditions be violated.

Brown
Presiding Justice

Copies to: Gray, Cary, Ames & Frye-SD
Thompson & Colegate-Riv.
District Attorney-Riv.
District Attorney-SD
Superior Court-SD

EXHIBIT A

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 29 1981

I have this day filed Order

HEARING DENIED

In re: 4 Civ. *No.* 13896

The San Diego Union

vs.

Superior Court, San Diego

Respectfully,

Clerk

cs

74368.5

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 29 1981

I have this day filed Order

In re: 4/cv. *No* 24897

Press-Enterprise

vs.

~~Superior Court, San Diego~~

Respectfully,

Clerk

By